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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 DANNIE RAY HILLHOUSE,

12 Petitioner,

13 v.

14 Warden of San Quentin State Prison,

15 Respondent.
16 _____/

No. CIV S-03-0142 MCE CMK P

DEATH PENALTY CASE

AMENDED FINDINGS

AND RECOMMENDATIONS

17 Petitioner, Dannie Ray Hillhouse, who has been convicted of first-degree murder
18 and sentenced to death seeks relief by writ of habeas corpus filed December 2003. Petitioner is
19 represented by panel attorneys James Thomson and Soar Stetler. Currently before the court is
20 respondent's motion to dismiss. This matter came on for hearing before the court on November
21 8, 2006. Paul O'Connor appeared on behalf of respondent, and Soar Stetler appeared for
22 petitioner.

23 The court filed findings and recommendations on April 6, 2007. On April 13,
24 2007, respondent filed objections. In light of the objections, the court issues amended findings

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1 and recommendations, which take into account respondent's objections regarding record based
2 claims, the probation report and clerical errors, but do not change the court's findings on claim
3 MM.

4 I. Factual And Procedural Background¹

5 In 1992 petitioner was convicted of first-degree murder, robbery, and kidnapping
6 for robbery² and sentenced to death. On the night of the offense, petitioner had gone to the
7 Madison Bear Garden, a bar in Chico, California, with his brother Lonnie Hillhouse (Lonnie).
8 At the bar, petitioner and Lonnie met Brett Schultz (Schultz), who purchased the three men a
9 pitcher of beer with a \$100 dollar bill. After a night of drinking, the three left the bar together,
10 with petitioner driving Schultz's truck.

11 Petitioner drove the three to an apartment complex, where Lonnie separated from
12 the group. Later that night, Lonnie saw petitioner and Schultz sitting in Schultz's truck. Schultz
13 was passed out from drinking. Lonnie stated that petitioner approached him and divulged that
14 Schultz had a lot of money and petitioner wanted to kill him and take it.³ Lonnie told petitioner
15 he wanted no part in the plan; however after petitioner threatened him, Lonnie got into the truck.

16 Petitioner, with Lonnie and Schultz in the truck, drove towards Paradise,
17 California. As they were driving, petitioner directed Lonnie to check Schultz's pockets, which
18 Lonnie did. Lonnie took several crumpled bills from Schultz and gave them to petitioner. At
19 some point, Schultz started coming to and asked where they were going. Petitioner supplied an
20 explanation, but as they continued driving, Schultz became increasingly concerned and asked to

21 ¹For a more detailed factual discussion, see the California Supreme Court's decision in
22 Hillhouse's direct appeal, People v. Hillhouse, 27 Cal.4th 469, 40 P.3d 754 (Cal. 2002).

23 ² The Court of Appeals reversed the kidnapping for robbery conviction and kidnapping-
24 murder special circumstance and otherwise affirmed the conviction. People v. Hillhouse, 27
Cal.4th 469, 40 P.3d 754 (Cal. 2002).

25 ³Lonnie testified against petitioner and accepted a plea bargain to serve a life sentence.
26 Part of the agreement included that the prosecutor would attempt to have Lonnie incarcerated in
Oklahoma, which is where Lonnie is presently incarcerated.

1 turn around. Petitioner turned the truck around. Shortly thereafter, Schultz requested to stop so
2 that he could relieve himself.

3 All three men got out of the truck. Schultz began urinating. Petitioner walked
4 around the truck and approached Schultz, saying something that Lonnie did not understand.
5 Schultz told petitioner not to “fuck with him while he was peeing.” Petitioner responded “I
6 ought to kill you.” Lonnie then heard a thunk and Schultz started gasping for air. Lonnie
7 testified that petitioner then stabbed Schultz twice more.

8 Petitioner asked Lonnie to help him drag Schultz’s body behind some trees. The
9 two men moved the body into the brush and then drove back to Chico. On the way back,
10 petitioner threw a knife from the truck.

11 At the guilt phase, the jury voted to convict petitioner of all charges.

12 At the penalty phase, the state introduced evidence of various other crimes
13 involving force or violence that defendant had committed. Petitioner had raped a college student
14 and then later, with the help of a cohort, sexually assaulted her again at knife point. Petitioner
15 had repeatedly sexually assaulted a woman with whom he had a relationship in the 1980's and
16 members of her family. Petitioner assaulted his landlord in 1986, knocking out several of his
17 teeth. Several other assaults were detailed. The state also introduced evidence that petitioner
18 had committed lewd acts with his sister, for which he was convicted in Oklahoma of indecent or
19 lewd acts with a child under fourteen. He also committed various crimes against his brother,
20 Lonnie, including sexual assault.

21 The defense introduced evidence about petitioner’s troubled childhood. His
22 father, Donald, repeatedly abused his mother, sometimes in front of the children. Donald was
23 absent from his children’s lives. Petitioner did poorly in school; dropping out in the ninth grade.
24 Petitioner started drinking and using marijuana at a young age. Four mental health experts
25 testified about petitioner’s mental condition.

26 At the penalty phase, the jury returned a verdict of death.

1 In November 1997, over five years after the jury's verdicts, the California
2 Supreme Court appointed counsel to represent petitioner in his automatic appeal, which included
3 any state habeas proceedings. Petitioner filed his brief on direct appeal in May 2000. The state
4 filed a reply in January 2001, and petitioner filed a reply in August 2001. In December 2001, the
5 automatic appeal was argued and submitted to the California Supreme Court. In February 2002,
6 the California Supreme Court issued its decision on petitioner's automatic appeal; the Court
7 reversed the kidnapping for robbery conviction and the kidnapping-murder special circumstance,
8 but otherwise affirmed the judgment. See People v. Hillhouse, 27 Cal. 4th 469, 480 (Cal. 2002).
9 Specifically, the Court held that the evidence was insufficient to support the kidnapping for
10 robbery and the kidnapping-murder special circumstance. See id. at 497. Petitioner was deemed
11 to be not guilty of kidnapping. The court acknowledged that the jury was instructed that the
12 alleged kidnapping could be used as a theory of felony murder; however, the court did not
13 reverse the jury's finding of first-degree murder because there was evidence of a robbery and
14 lying in wait. In short, the court concluded that the first-degree murder verdict rested on at least
15 one correct theory. See id. at 497. In May 2002, the California Supreme Court denied
16 petitioner's request for a rehearing without comment.

17 In August 2002, petitioner filed a motion for a writ of certiorari for review of the
18 California Supreme Court's denial of his direct appeal. On January 13, 2003, the United States
19 Supreme Court denied the petition for a writ of certiorari. Thus, petitioner's conviction became
20 final on January 13, 2003.

21 Petitioner filed his first state habeas petition in November 2001. The California
22 Supreme Court denied petitioner's state habeas petition, without comment, in October 2002.

23 Petitioner requested appointment of counsel, permission to proceed in forma
24 pauperis, and a stay of execution in this court on January 24, 2003. James Thomson was

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1 appointed as lead counsel for petitioner on February 20, 2003. Soar Stetler was appointed as
2 second counsel for petitioner on November 5, 2003. Petitioner filed his first federal habeas
3 petition on December 31, 2003.

4 On December 31, 2003, petitioner also filed a motion to hold his federal habeas
5 proceedings in abeyance pending adjudication by the California Supreme Court of a second state
6 habeas petition involving claims that were not exhausted in the first state petition. On March 16,
7 2004, this court granted petitioner's request to hold the federal proceedings in abeyance.

8 Mr. Thomson and Mr. Stetler were appointed by the California Supreme Court to
9 represent petitioner in his second state habeas proceedings in April 2004. On July 31, 2004,
10 petitioner filed his second state habeas petition. On November 10, 2004, the California Supreme
11 Court denied the petition. On February 8, 2005, petitioner filed a petition for writ of certiorari.
12 Petitioner filed a request in this court that his federal habeas proceedings continue to be held in
13 abeyance in light of his right to petition the United States Supreme Court for a writ of certiorari.
14 The petition for certiorari was denied on October 3, 2005.

15 After the denial of certiorari, petitioner filed a request in this court for a sixty day
16 extension of time to file his amended federal habeas petition. Respondent filed a statement of
17 non-opposition to the request. The court neither granted nor denied petitioner's request for an
18 extension of time to file his first amended federal petition. Petitioner filed his first amended
19 federal petition on December 2, 2005. On May 1, 2006, respondent filed a responsive
20 pleading—the motion to dismiss which is currently before the court for decision.

21 II. Conceded Claims

22 As an initial matter, the court notes that respondent concedes that some of
23 petitioner's amended claims relate back to his original claims. Respondent concedes that the
24 following claims, or parts of claims, relate back to the original petition:

- 25 (1) Claim A— THE VENUE OF THE TRIAL WAS UNCONSTITUTIONAL
relates back
- 26 (2) Claim B— THE SELECTION OF THE GUILT PHASE JURY

VIOLATED MR. HILLHOUSE'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS relates back as to jurors Steve B and Doug T.

(3) Claim Q– ILLEGALLY OBTAINED EVIDENCE CAUSED PETITIONER TO BE UNCONSTITUTIONALLY CONVICTED AND SENTENCED TO DEATH relates back only to the extent that it concern's Lonnie's statements.

(4) Claim Z– PETITIONER WAS UNCONSTITUTIONALLY FOUND GUILTY BY A JURY THAT FAILED TO UNANIMOUSLY FIND EVERY ELEMENT TRUE BEYOND A REASONABLE DOUBT relates back

(5) Claim DD– THE JURY INSTRUCTIONS WERE INCOMPLETE AND CONFUSING AND THUS UNCONSTITUTIONAL relates back

(6) Claim HHH– THE CALIFORNIA SUPREME COURT IMPLICITLY HELD THAT PETITIONER WAS CONVICTED AND SENTENCED TO DEATH BY A JURY AND TRIAL COURT THAT WERE UNREASONABLE relates back

(7) Claim JJJ– THE CALIFORNIA SUPREME COURT ERRED ON APPEAL WHEN IT FAILED TO REVERSE THE DEATH PENALTY AFTER FINDING THAT ONE SPECIAL CIRCUMSTANCE WAS IMPROPERLY TRUE relates back.

III. Standards For Relation Back Under AEDPA's One-Year Limitations Period

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. AEDPA places a one-year statute of limitations on the filing of petitions for writs of habeas corpus. See 28 U.S.C. § 2244(d). The one-year limitations period applies to all federal petitions filed after the effective date of AEDPA. As petitioner's first federal habeas petition was filed on December 31, 2003, AEDPA's statute of limitations applies. Untimely petitions are barred from federal review. See 28 U.S.C. § 2244(d).

In ordinary civil pleadings, Rule 8 requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." See Fed. R. Civ. P 8(a)(2). Rule 2 of the Rules Governing Habeas Corpus Cases requires a more detailed statement. "The habeas rule instructs the petitioner to 'specify all the grounds for relief available to [him]' and to 'state the facts supporting each ground.'" See Felix v. Mayle, 545 U.S. 644, 649 (2005)(quoting Rule 2(c) of the Rules Governing Habeas Corpus Cases). Congress has provided that a habeas petition may be amended as provided in the rules of procedure applicable to civil actions. 28 U.S.C. § 2242. Under the Federal Rules of Civil Procedure, pleading amendments relate back to the date

of the original pleading when “the claim...asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.” See Fed. R. Civ. P 15(c)(2).

Thus, in order for an amended habeas petition, filed after AEDPA’s one-year limitation, to relate back to the original timely pleading, the amended and original claims must be tied by a common core of operative facts. See Mayle, 545 U.S. at 664.

IV. Discussion

In his motion to dismiss, respondent contends that 37⁴ of the 88 claims in petitioner’s first amended federal habeas petition do not relate back to the original petition under the rule set forth in Mayle, and are, therefore, untimely. In his opposition to the motion to dismiss, petitioner argues that the motion to dismiss is improper because it is not a responsive pleading to his first amended habeas petition. He argues that his amended claims are timely under 28 U.S.C. § 2244(d)(1)(D), that his amended claims are timely because they relate back under Mayle and preserve petitioner’s original, timely filing date of December 31, 2003 , and that, even if his amended claims are untimely, he is entitled to equitable tolling.

A. Proper Response To A Habeas Petition

The court first considers whether a motion to dismiss is a proper response to a petition for a writ of habeas corpus. Petitioner notes that Rule 5 of the Rules Governing Habeas Corpus Cases requires that an answer to a habeas petition must address all the allegations in the petition. Petitioner argues that respondent did not properly respond to the amended petition under Rule 5 because the motion to dismiss does not respond to all of the claims in the amended petition and, instead, only addresses half of the amended claims. Petitioner urges the court to find the motion to dismiss unresponsive and to deny the motion and require respondent to file an

⁴In his motion to dismiss, respondent argued that 48 of the amended claims did not relate back (doc. 56 at 10-18); however, in his reply to petitioner’s opposition, respondent conceded that some of the challenged claims related back and argued that 44 claims were untimely. (Doc. 84 at 9.)

1 answer. In the alternative, petitioner urges the court to interpret respondent's failure to address
2 half the claims in the amended petition as a concession that petitioner is entitled to relief on these
3 claims.

4 The court finds that it is in the interests of judicial efficiency to permit the
5 respondent to raise the procedural issue of AEDPA's statute of limitations before responding to
6 the merits of the habeas petition. The district court has the discretion to order or permit
7 respondents to file a motion to dismiss before respondent files an answer. See Hab. Corp. R. 4
8 advisory committee's note 2004 Amendments; White v. Lewis, 874 F.2d 599 (9th Cir. 1989).
9 Thus, although "the state has no right, as it would in non-habeas civil litigation, to file a 12(b)(6)
10 motion to dismiss, the Court now has the discretion to allow such a motion where ... the issues
11 raised by the state are appropriate for summary resolution." Shariff v. Artuz, 1998 WL 17734, *1
12 n. 1 (S.D.N.Y. Jan. 16, 1998). The court notes that is an acceptable practice in this district to
13 allow motions to dismiss which do not address all the claims in a habeas petition. See e.g.,
14 Burton v. Runnels, CIV-S-02-0675 LKK PAN (JFM) 2006 WL 1062097; Collins v. Runnels,
15 CIV-S-04-1516 DFL GGH, 2006 WL 842369. Accordingly, the court finds that the instant
16 motion to dismiss is an appropriate response to petitioner's first amended habeas petition.

17 The court declines to interpret the motion to dismiss as a concession that
18 petitioner is entitled to relief on the claims not addressed in this motion. Instead, the court
19 recognizes that respondent is raising the procedural issue of the timeliness of some of
20 petitioner's amended claims under AEDPA and that respondent will address the merits of all
21 claims not barred by AEDPA's one-year statute of limitations in an answer.

22 B. Timeliness Of The Claims In Petitioner's Amended Petition

23 Respondent argues that 37 of the 88 claims in petitioner's first amended petition
24 do not relate back to the claim in his original petition and, therefore, are untimely under
25 AEDPA's one-year limitations period. Petitioner argues that his claims are timely under 28
26 U.S.C. § 2244(d)(1)(D) and that his claims are timely because they relate back under Mayle.

1. 28 U.S.C. § 2244(d)(1)(D)

AEDPA provides in relevant part:

(d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review;

....

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(d)(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

22 U.S.C. § 2254 (d)(1). Petitioner states that his first amended petition was filed less than one year after the factual predicates for the amended claims were discovered through due diligence of his appointed counsel, and, therefore, are timely under 2244(d)(1)(D).

In support of this contention, petitioner merely recites the history of counsel's appointment and some procedural case history. Specifically, petitioner states that counsel were appointed in February and November 2003. On December 31, 2003, petitioner filed his original federal petition raising exhausted claims and notifying respondent and the court of unexhausted claims that had been discovered by counsel during review of the state court record and preparation of the amended petition.

The statute of limitations in § 2244(d)(1)(D) begins to run when the prisoner knows the important facts, not when the prisoner recognizes their legal significance. See Hansen v. Galaza, 254 F.3d 1150 (9th Cir. 2001). In his argument that § 2244(d)(1)(D) applies, petitioner does not indicate the date that he or his counsel became aware of the allegedly newly discovered factual predicates for his amended claims. Instead, petitioner makes a conclusory claim that his amended petition was "filed less than one year after the factual predicates for these

claims were first discovered.” (Doc. 75 at 52.) While the court could speculate when that time was—anytime between February 20, 2003, when Mr. Thomson was appointed to represent petitioner and December 2005 when the amended petition was filed, the court declines to do so. The court finds that counsel has not made an adequate showing of due diligence to invoke § 2244(d)(1)(D)’s tolling provision.

2. Relation Back Of The Amended Claims To The Original Claims

After AEDPA’s one-year statute of limitations has run, Federal Rule of Civil Procedure (15)(c) is the only vehicle through which a petitioner may amend his federal habeas application. See Mayle, 545 U.S. at 644. An amendment to the original petition only relates back to the date of the original when “the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth” in the original petition. See id. The common core of operative facts must not be viewed at too high a level of generality and an occurrence will consist of each separate set of facts that supports a ground for relief. See id. Under this framework, the court will analyze the 37 contested claims.

First, however, the court considers whether petitioner gave timely notice of the facts and legal theories supporting the claims in his amended petition through his original petition and the contemporaneously filed motion to hold the federal proceedings in abeyance. Both the original petition and the abeyance motion included footnotes which stated that the potentially unexhausted claims “included but were not limited to” several claims which were listed out in the footnote. (Doc 12 at 3, n.1; Doc. 13 at 8, n. 5.) Although the claims were listed, the operative facts were not included.

Many, but not all, of the unexhausted claims listed in the original petition and the abeyance motion are record based claims, meaning that respondent would have had notice of the operative facts from the record. Mayle, however, is very clear that a “notice” pleading is not sufficient for relation back in habeas cases. See Mayle, 545 U.S. at 655-56, 661. Specifically, Mayle clarified that the Rules Governing Habeas Corpus Cases requires that a petition specify

1 the grounds for relief available to the petitioner and the facts supporting each ground. See id. at
2 655-656.

3 In support of his contention that he gave timely notice of the factual basis for his
4 amended claims in the footnotes in the original petition and abeyance motion, petitioner directs
5 the court to a recent case from the Northern District, Gonzales v. Terhune, 2006 WL 83054
6 (unpublished N.D. Cal. 2006). In Gonzales, the court held that the petitioner had satisfied the
7 “dictates of Mayle by giving the state and the court specific and timely notice of the ‘facts and
8 legal theory he wanted to later include in his amended petition’” in his abeyance motion. Id. at
9 *17 (internal citations omitted). The court specifically noted that “petitioner provided notice in
10 his original petition of the claims yet to be exhausted in state court and the factual basis for those
11 claims.” Id. at *14, *17. In Gonzales the holding that petitioner had satisfied Mayle’s
12 requirements rested on the operative facts of his unexhausted claims being included in his
13 abeyance motion and in his amended petition. See id. at *17.

14 Petitioner’s case is distinguishable from Gonzales because petitioner did not
15 detail the operative facts of his unexhausted claims in either his original petition or in his
16 abeyance motion. Instead, the footnote contained in each filing was more like a notice pleading.
17 Given the restrictive language of Mayle, the court finds that the footnotes in the original petition
18 and the abeyance motion were not sufficient to provide notice of petitioner’s claims for the
19 purposes of relation back.

20 Accordingly, the court examines the 37 contested claims to determine if they
21 relate back to the original claims under Mayle. See Mayle, 545 U.S. at 657.

22 Claim B THE SELECTION OF THE GUILT PHASE JURY VIOLATED
23 MR. HILLHOUSE’S RIGHTS UNDER THE SIXTH, EIGHTH
AND FOURTEENTH AMENDMENTS

24 (Doc. 42 at 9.) Respondent concedes that this claim relates back to the timely filed claim with
25 respect to jurors Steve B. and Doug T. In Claim W2 of the original complaint, petitioner
26 asserted that during voir dire trial counsel informed the jury about petitioner’s extensive history

1 of bad acts... Time and time again trial counsel listed these bad acts when individually examining
 2 jurors. (Doc. 13 at 145.) The amended petition individually names jurors, but the operative facts
 3 remain the same as in the original petition—time and time again trial counsel listed petitioner’s
 4 bad acts when individually examining jurors. The claim asserted in the amended pleading arose
 5 out of the conduct, transaction, or occurrence set forth or attempted to be set forth” in the
 6 original petition. The court finds that this claim relates back in its entirety.

7 Claim E THE PETIT JURY VENIRE IN BUTTE COUNTY WAS
 8 UNCONSTITUTIONAL SINCE IT FAILED TO REPRESENT A
 FAIR CROSS-SECTION OF THE COMMUNITY

9 (Doc. 42 at 69.) In his original petition, petitioner mentioned general facts concerning the bias
 10 of potential jurors. However, these claims concern trial court error for denying challenges for
 11 cause to perspective jurors (Doc. 13 at 41-45) and failure to conduct voir dire in a competent
 12 manner (Id. at 145). For example, the original petition stated that “by permitting obviously
 13 biased jurors to serve on the jury, the trial court erred.” (Id. at 151-52) There is no “core of
 14 facts” in the original petition which relates to systematic under representation of minority groups
 15 in the venire. The court finds that this claim does not relate back under Mayle and is untimely.

16 Claim F TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO
 17 ADDRESS AND PRESERVE JURY SELECTION ISSUES

18 (Doc. 42 at 71.) The original petition asserted that trial counsel was ineffective for failing to
 19 conduct voir dire questioning in a competent manner. (Doc. 13 at 42.) He argued that the trial
 20 court erred in denying challenges to perspective jurors. (Doc 13 at 41.) However, these claims
 21 are separate in time and type from the claim that trial counsel was ineffective for failing to
 22 address and preserve jury issues. There is no core of facts concerning trial counsel’s failure to
 23 preserve issues. In fact, the claim regarding voir dire, concerns the trial counsel’s allegedly poor
 24 decision to detail petitioner’s previous crimes to the jury, not any failure to act. The court finds
 25 that this claim does not relate back under Mayle and is untimely.

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1 Claim G THE JURY WAS BIASED TOWARDS THE STATE
2 GENERALLY AND TOWARDS THE PROSECUTOR
3 SPECIFICALLY

4 (Doc. 42 at 72.) In his original petition, petitioner argued that there was significant media
5 publicity surrounding the trial and that juror Steve B. had read about the trial and was biased,
6 based on media coverage, to believe that petitioner was guilty (original pet. 43.) In claim G,
7 petitioner argues that Carol P. approached the prosecutor at a concert and told her that she was
8 doing a great job. In support of his argument that the claim relates back, petitioner argues that he
9 made lots of references to bias by other jurors (Steve B., juror JA, juror JB, etc.) (opp. pg 19);
10 however keeping Mayle's dictates in mind, it is clear that this claim is not similar to core facts or
11 in time or type to a claim in the original petition. Carol P.'s meeting with the prosecutor at a
12 concert (during the trial) and telling the prosecutor she was doing a good job is separated in time
13 and type from claims that jurors were biased due to media attention surrounding the trial.

14 Petitioner also points to his abeyance motion's footnote which listed the
15 unexhausted claim that trial counsel was ineffective for failing to conduct adequate voir dire or
16 to exercise challenges to dismiss partial or biased jurors. (Doc. 75 at 21.) However, the
17 amended claim that counsel was ineffective for failing to conduct adequate voir dire to discover
18 biased jurors differs in time and type from the amended claim of jury bias towards the
19 prosecutor claim. The court finds that this claim does not relate back under Mayle and is
20 untimely.

21 Claim Q ILLEGALLY OBTAINED EVIDENCE CAUSED PETITIONER
22 TO BE UNCONSTITUTIONALLY CONVICTED AND
23 SENTENCED TO DEATH

24 (Doc. 42 at 138.) Respondent concedes that to the extent that claim Q concern's Lonnie's
25 statements, it relates back. The original petition mentioned the initial police search of the
26 dwelling Lonnie and petitioner shared, which contained language that trial counsel failed to
present available evidence to impeach Lonnie's credibility. As part of this claim, petitioner
alleged that trial counsel failed to examine a witness about some shoes, because counsel believed

1 that the washed shoes were Lonnie's. The original petition mentions examining two pairs of
2 shoes and mentions that Lonnie was in charge of separating all the clothes for the police and
3 telling the police which clothes he wore and which clothes petitioner wore. (Doc. 13 at 150.)

4 In his opposition to the motion to dismiss, petitioner claims that the seizure of property
5 references the initial police search of the dwelling where Lonnie and petitioner lived. However,
6 Claim Q in the amended petition does not make clear what property was illegally seized. As the
7 Supreme Court recently made clear, a petitioner does not satisfy the Rule 15 "relation back"
8 standard unless the conduct arises from the same conduct, transaction or occurrence. See Mayle,
9 545 U.S. at 655-56. The claims added by amendment must arise from the same core facts.
10 See id. The court finds that the amended claim relates back to the original claim with regard to
11 Lonnie's statements and the initial search of the dwelling where petitioner and Lonnie were
12 staying.

13 Claim R PETITIONER WAS UNCONSTITUTIONALLY CONVICTED
14 AND SENTENCED TO DEATH BASED ON HIS
UNLAWFULLY OBTAINED STATEMENTS

15 (Doc. 42 at 140.) Petitioner asserts that amended claim R relates back to Claim A in the original
16 petition. Claim A in the original petition is based on facts pertaining to Lonnie's statements.
17 The court finds that the amended claim concerning petitioner's statements does not relate back to
18 the timely claim.

19 Petitioner further argues that amended claim R relates back to the ineffective assistance
20 of counsel claim which discusses petitioner's statements to guards during transportation;
21 however, the court finds that the amended claim is separated in type from the claim in the
22 original petition and does not relate back.

23 Claim S. THE TESTIMONY OF THE STATE'S CRIMINALIST AS TO
24 INTOXICATION WAS UNCONSTITUTIONAL

25 (Doc. 42 at 142.) The original petition claimed that trial counsel was ineffective for failure to
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1 timely investigate and prepare for trial. (Doc. 13 at 138). The BEAM⁵ test (what the state's
 2 criminalist testified about) was described, but the focus of the factual claim was that trial counsel
 3 did not have the results of the test, which the original petition claimed would have shown no
 4 premeditation, prior to the beginning of the trial. There is no core of operative facts between
 5 these facts and the facts alleged in the amended petition concerning the rebuttal testimony about
 6 intoxication. The court finds that this claim does not relate back and is untimely.

7 Claim W THE PROSECUTION'S NUMEROUS IMPROPER ACTS AS TO
 8 THE CHARGES AGAINST PETITIONER VIOLATED HIS
 CONSTITUTIONAL RIGHTS

9 (Doc. 42 at 155.) The original petition described the prosecutor's refiling of charges and her
 10 amendment of charges in the factual history section of the petition. Petitioner did not use these
 11 facts to support a claim for relief. There is no authority for allowing relation back to claims
 12 mentioned in the factual history section of a habeas application. Mayle stresses that a petitioner
 13 must state all the grounds for relief from the conviction. A petitioner must show a common core
 14 of operative facts uniting the original and newly asserted claims. See Mayle, 545 U.S. at 656-57.
 15 An event described as a factual event in the factual background section of a petition does state
 16 "facts that point to a real possibility of constitutional error." There is no claim in the original
 17 petition with a similar core set of facts to amended claim W. The court finds that this claim does
 18 not relate back and is untimely.

19 Claim X THE STATE'S PLEA BARGAIN WITH PETITIONER'S
 20 BROTHER AND CO-DEFENDANT WAS
 UNCONSTITUTIONAL

21 (Doc. 42 at 159.) In claims A and C of his original petition, petitioner discussed Lonnie's plea.
 22 In claim A, petitioner stated that Lonnie's testimony was insufficient to support his conviction
 23 and death sentence. Petitioner's supporting facts were that Lonnie's testimony was contradicted

24 ⁵The BEAM test is described in the amended petition. (Doc. 42 at 407.) It resembles
 25 something one would encounter at a fraternity party. It is a test administered by a neurologist
 26 during which petitioner was forced to drink alcohol until he reached a certain blood alcohol
 level.

1 by his own statements and that he gave at least seven different statements to law enforcement.
2 (Doc. 13 at 14-16.) In claim C petitioner argued that his due process rights were violated by
3 Lonnie's coerced plea bargain. In particular, petitioner emphasized that Lonnie understood that
4 he had to testify in accordance with previous statements, regardless of the truth to get the benefit
5 of his plea bargain. (Doc. 13 at 38-40.)

6 In amended claim X, petitioner focuses on Lonnie's probation report, which
7 reveals numerous allegedly improper aspects of the plea deal. (Doc. 42 at 159.) The original
8 claim and the amended claim do not relate to evidence obtained at the same time or to the same
9 conduct. See Mayle, 545 U.S. at 664, n.7. They are not tied together with a similar operative
10 core of facts. See id. It is not possible to inter-change the facts of the original claim with the
11 supporting facts in amended claim X. The court finds that this claim does not relate back to the
12 original petition and is untimely.

13 Claim Y THE PROSECUTION PROVIDED IMPROPER
14 CONSIDERATION TO WITNESSES IN THIS CASE

15 (Doc. 42 at 166.) Petitioner's original petition complained about certain aspects of prosecution
16 witness testimony. He asserted that he was limited in his cross examination of Gary Reep and,
17 regarding Dodge's testimony, focused largely on how it contradicted Lonnie's testimony (Doc.
18 13 at 16.) The original petition discussed that Lonnie's testimony was inherently not credible
19 and was insufficient to support petitioner's death sentence. (Doc. 13 at 11-17.) The claims in
20 the original petition do not share a common core of facts with the theory that prosecution
21 witnesses received improper consideration. The facts are different in both time and type. The
22 court finds that this claim does not relate back to the original filing and is untimely.

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1 Claim Z PETITIONER WAS UNCONSTITUTIONALLY FOUND
2 GUILTY BY A JURY THAT FAILED TO UNANIMOUSLY
3 FIND EVERY ELEMENT TRUE BEYOND A REASONABLE
4 DOUBT

5 (Doc. 42 at 169.) Respondent concedes that this claim relates back because it has a common
6 core of operative facts and merely states a new legal theory.

7 Claim DD THE JURY INSTRUCTIONS WERE INCOMPLETE AND
8 CONFUSING AND THUS UNCONSTITUTIONAL

9 (Doc. 42 at 181.) Respondent concedes that the insufficiency of evidence challenge in amended
10 claim DD relates back to the timely petition. In amended claim DD, petitioner also challenges
11 the consciousness of guilt instruction (CALJIC 2.06). This instruction was not mentioned in the
12 original petition. Thus, the pertinent facts supporting the challenge to the consciousness of guilt
13 instruction were not in the original petition, and it cannot relate back; the facts supporting the
14 alleged insufficiency differed in time and type from the facts mentioned in the original petition.

15 Petitioner also argues that the legal theory for amended claim DD was discussed
16 in the abeyance motion. It is not enough to discuss the legal theory, there must be a common
17 core of operative facts. The legal theory can change, but, for relation back, the facts may not.
18 The court finds that amended claim DD relates back to the extent that it challenges the
19 insufficiency of evidence instruction. The court finds that to the extent that amended claim DD
20 challenges the consciousness of guilt instruction, it does not relate back.

21 Claim HH TRIAL COUNSEL WERE INEFFECTIVE IN CONCEDEDING
22 THAT PETITIONER WAS GUILTY OF SECOND-DEGREE
23 MURDER

24 (Doc. 42 at 204.) Petitioner's original petition stated that, because "trial counsel was unprepared
25 to present the mental history and test results of the mental health experts" at the time of opening
26 statements, he was unprepared to present readily available evidence to support a verdict of
second degree murder. (Doc. 13 at 141.) Amended claim HH claims that trial counsel was
ineffective in conceding that petitioner was guilty of second degree murder during opening

statements. Both pleadings relate to the trial counsel's argument during opening statements that petitioner was guilty of second degree murder; only the legal theory has changed. The court finds that amended claim HH relates back to the original petition and is timely.

Claim II TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE
WHEN THEY INTRODUCED TESTIMONY FROM LONNIE
THAT PETITIONER MOLESTED HIM AND THE TRIAL
COURT ERRED IN ALLOWING FURTHER TESTIMONY ON
THIS ISSUE

(Doc. 42 at 206.) The original petition claimed that petitioner's molestation of Lonnie gave Lonnie a strong motive to lie about petitioner, calling Lonnie's credibility into question. (Doc. 13 at 22.) The original petition alleged that Lonnie had told others that petitioner molested him. (Id.) Amended claim II discusses defense counsel's questioning of Lonnie concerning the incident and the prosecution's follow up of that questioning on re-direct. These are a totally different sets of facts in both time and type from the original claim that Lonnie stated that petitioner molested him and that such evidence gave Lonnie a motivation to lie. The court finds that this claim does not relate back to the original petition.

Claim JJ TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO
ASSERT THE CONSTITUTIONAL BASIS OF GUILT PHASE
OBJECTIONS

(Doc. 42 at 209.) The original petition argued that the admission of certain hearsay statements violated the rules of evidence and challenged the trial court's ruling allowing the statements. The original petition stated that trial counsel objected to Lonnie's statements as hearsay. (Doc. 13 at 28-29.) The original petition argued that trial counsel was inadequate for not objecting to alleged prosecutorial misconduct. (Doc. 13 at 86.) The legal theory advanced in amended claim JJ is new; however, the court finds that the amended claim relies on a common core of operative facts which was raised in the original pleading. The court finds that amended claim JJ is timely.

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Claim MM THE STATE UNCONSTITUTIONALLY SPIED ON MR. HILLHOUSE'S CONFIDENTIAL COMMUNICATIONS DURING CONFIDENTIAL TESTING AND USED THIS ILL-GOTTEN INFORMATION AT TRIAL, WHILE DEFENSE COUNSEL INEFFECTIVELY ALLOWED THESE CONSTITUTIONAL VIOLATIONS TO OCCUR AND EVEN IMPROPERLY INTRODUCED INFORMATION FROM ONE OF THE SPIES

(Doc. 42 at 218). Amended claim MM discusses the guards' behavior during the BEAM test and the Deputy District Attorney's interview of the guards about the BEAM test. It also discusses the behavior of defense counsel and the prosecutor's actions at trial regarding the BEAM test evidence. The facts listed in the original petition were that guards elicited statements from petitioner after his BEAM test and illegally told such statements to prosecutors. (Doc. 13 at 140.) After careful consideration, the court finds that the legal theories in the amended petition have changed, but the core facts of amended claim MM are contained in the original petition's claims. Accordingly, the court finds that this claim relates back and is timely.

Claim NN THE PROSECUTION'S DECEPTIVE AND INVASIVE INTERVIEWS WITH MR. HILLHOUSE'S FAMILY WERE UNCONSTITUTIONAL

(Doc. 42 at 248.) Petitioner's original petition discussed prosecution interviews with Lonnie. It did not mention interviews with any of petitioner's other family members. The core facts of claim NN are not similar in time and type to the facts of the interviews with Lonnie. Petitioner points out that the abeyance motion listed "prosecutorial misconduct...regarding the investigation conducted by DA investigator Lightner" as an unexhausted claim; however, the abeyance motion did not set forth the factual basis for this claim. The facts necessary to support amended claim NN were not discussed in the original petition or in the abeyance motion. The court finds that this claim does not relate back and is untimely.

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1 Claim OO TESTIMONY AT THE PENALTY PHASE WAS MATERIALLY
2 INACCURATE AS TO PETITIONER’S FATHER BEING A
3 CHILD MOLESTER

4 (Doc. 42 at 275.) The original petition argued that trial counsel had failed to properly develop
5 mitigation evidence. (Doc. 13 at 159-161.) It stated that, had they been called, several witnesses
6 would have testified that petitioner’s father, Donald Hillhouse, abused his wife and children.
7 (Doc. 13 at 160-61.) Specifically, it stated that witnesses would have testified that Donald was a
8 cruel, brutal and abusive man who repeatedly molested petitioner. Amended claim OO states
9 that Donald’s testimony at petitioner’s trial that he had never touched petitioner in a sexual way,
10 was false. Amended claim OO states that Donald’s testimony at petitioner’s trial was
11 contradicted by his criminal record, which showed that he had plead guilty to lewd acts with a
12 child. The operative factual basis for the claim is Donald’s arrest record, which differs from the
13 factual basis of the original claim – that several witnesses would have testified that Donald
14 abused his children. The legal theory is the same in the original and amended claims—that the
15 jury was not presented with the mitigating evidence that petitioner was sexually abused by his
16 father; however, the facts supporting the original and amended claims are different. Because the
17 two claims do not share a core of common facts, the court must find, under Mayle, that amended
18 claim OO does not relate back to the original petition.

19 Claim PP THE PROSECUTION UNCONSTITUTIONALLY ARGUED
20 LACK OF REMORSE AT THE PENALTY PHASE

21 (Doc. 42 at 278.) Petitioner’s original petition claims that the prosecutor stated that petitioner “is
22 what he is...and is going to do exactly what he does until he is dead.” (Doc. 13 at 105.) The
23 claims in the original petition described that the prosecutor had discussed petitioner’s brain
24 damage to his frontal lobe by saying that the frontal lobe was where decisions were made and
25 that, once this was eliminated, not much of a human being was left. (Id. at 106.) The original
26 petition claimed that the prosecutor characterized petitioner as incapable of caring for other
humans.

1 Amended claim PP claims that the prosecutor improperly told the jury that
 2 petitioner had a lack of remorse for his crimes and that petitioner had never demonstrated any
 3 sympathy. (Doc. 42 at 278.) Although the wording of the prosecutor's allegations is slightly
 4 different in the original and amended claims, the core facts are similar in time and type. The
 5 court finds that amended claim PP relates back to the original petition and is timely.

6 Claim QQ THE PROSECUTOR MISLEAD THE JURY DURING
 7 CLOSING ARGUMENT AT THE PENALTY PHASE

8 (Doc. 42 at 280.) There is no common core of operative facts between amended claim QQ's
 9 assertion that the prosecutor lied by saying that she always sought the death penalty and
 10 operative facts supporting the claims in the original petition. Careful examination of the original
 11 petition shows that the original petition set forth facts indicating that the prosecutor stated that
 12 both Lonnie and petitioner were guilty of first-degree murder. (Doc. 13 at 24-25.) These facts
 13 are similar in time and type to the facts alleged in amended claim QQ to support the claim that
 14 the prosecutor lied by suggesting that she always thought that petitioner was the murderer. The
 15 court finds that amended claim QQ relates back to the original claim only with respect to the
 16 assertion that the prosecutor mislead the jury during the penalty phase closing argument by
 17 suggesting that she always believed petitioner was the murder.

18
 19 Claim RR THE PROSECUTOR REPEATEDLY COMMITTED
 20 MISCONDUCT THROUGHOUT THE TRIAL

21 (Doc. 42 at 283.) The original petition mentions prosecutorial misconduct. The factual basis
 22 for the prosecutorial misconduct claims in the original petition differ from the factual basis for
 23 the same claims in amended claim RR. Mayle made clear that a petitioner does not satisfy the
 24 Rule 15 "relation back" standard merely by raising some type of ineffective assistance in the
 25 original petition, and then amending the petition to assert another ineffective assistance claim
 26 based upon an entirely distinct type of attorney misfeasance. See Mayle, 545 U.S. at 657-58.

1 The court finds that amended claim RR does not relate back.

2 Claim TT THE TRIAL COURT SHOULD HAVE DECLARED A
3 MISTRIAL WHEN THE JURY INDICATED IT WAS
4 DEADLOCKED AT THE PENALTY PHASE AND TRIAL
 COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE
 FOR A MISTRIAL

5 (Doc. 42 at 292.) The original petition sets forth a chronology of events during the trial,
6 including the deliberations during the penalty phase. (Doc. 13 at 107-108). The original
7 petition mentions that the jury informed the judge that it was deadlocked; the judge sent the jury
8 home for the weekend; and the following Monday morning, the jury delivered its death verdict.
9 (Doc. 108.) These core facts make up the factual basis for claim TT. (Doc. 42 at 292-293.) The
10 court finds that this claim relates back to the original petition.

11 Claim WW TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE
12 BY FAILING TO PURSUE A PLEA BARGAIN

13 (Doc. 42 at 317.) The original petition discussed Lonnie's plea bargain; however, it made no
14 mention of any plea bargain (or failure to seek such) for petitioner. The fact that a plea bargain
15 was entered into with Lonnie does not form the core set of facts to support the claim that
16 petitioner's counsel should have sought a plea for him. The court finds that this claim does not
17 relate back.

18 Claim XX TRIAL COUNSEL FAILED TO ASSERT THE
19 CONSTITUTIONAL BASES OF PENALTY PHASE
 OBJECTIONS

20 (Doc. 42 at 318.) The original petition describes defense counsel's failure to assert
21 constitutional bases for objections during the penalty phase. (Doc. 84-85.) Amended claim XX
22 relies on these facts from the original petition, although they are used to bolster a different legal
23 theory. The court finds that amended claim XX relates back to the original petition.

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1 Claim YY TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE
2 BY MAKING IMPORTANT TESTIMONY AS TO THE
3 VICTIM'S PUNCTATE WOUNDS" A RUNNING JOKE AT
4 TRIAL

5 (Doc. 42 at 320.) The original petition stated that Lonnie testified that a fight immediately
6 preceded the murder. (Doc. 13 at 17-18.) The original petition described that Lonnie stated that
7 petitioner and the victim exchanged words while the victim was urinating and that Lonnie heard
8 a thunk sound when petitioner first stabbed the victim. Although these facts describe a fight and
9 a stabbing, they do not share a common core of operative facts with amended claim YY.
10 Nothing in Lonnie's description of the fight could be used to support the assertion in amended
11 claim YY that trial counsel provided ineffective assistance of counsel by making jokes. The
12 facts in the original and amended petitions are completely different in time and type. The court
13 finds that this claim does not relate back.

14 Claim BBB MR. HILLHOUSE WAS MADE TO ENDURE A TORTUROUS
15 PROCEDURE KNOWN AS A BEAM ALCOHOL CHALLENGE
16 IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

17 (Doc. 42 at 407.) The original petition stated that petitioner was administered a BEAM test; that
18 the raw data of the test was sent to consulting doctors; and that the test results were received in
19 mid-May, almost at the end of the guilt phase. (Doc. 13 at 140.) The original petition does not
20 describe how the BEAM test is administered. Amended claim BBB's assertions that the BEAM
21 test violated petitioner's constitutional rights rests on very detailed factual description of the
22 BEAM test. The facts which were contained in the original petition could not support amended
23 claim BBB. The original and amended claims do not share a common core set of facts. The
24 court finds that amended claim BBB does not relate back to the original petition.

25 Claim CCC THE TRIAL COURT ERRED AND TRIAL COUNSEL WERE
26 INEFFECTIVE FOR FAILING TO REQUEST A JURY
 INSTRUCTION PROHIBITING THE DOUBLE COUNTING OF
 ACTS UNDERLYING THE SPECIAL CIRCUMSTANCE

(Doc. 42 at 411.) The original petition sets forth facts about double counting of certain

aggravating factors. (Doc. 13 at 116-117.) Amended claim CCC relies on double counting
aggravating factors to support an error and ineffective assistance of counsel claim. Although a
different legal theory is advanced, the original and amended petitions rely on the same core of
common facts. The court finds that this claim relates back.

Claim DDD THE TRIAL COURT ERRED BY FAILING TO INSTRUCT
THE JURY THAT PETITIONER MAY RELY ON THE STATE
OF THE EVIDENCE AT THE PENALTY PHASE

(Doc. 42 at 413.) Amended claim DDD is based on CALJIC Nos 2.60 and 2.61. Although the
original petition contains claims that some jury instructions undermined the constitutional
requirement of proof beyond a reasonable doubt, the factual basis in the original petition's
claims cannot support amended claim DDD, which concerns an alleged constitutional violation
based on the trial court's failure to provide the jury guidance regarding petitioner's decision not
to testify. (Doc. 42 at 413.) Because there is no common core of facts, the court finds that
amended claim DDD does not relate back.

Claim EEE DEFENSE COUNSEL'S CONFLICTS OF INTEREST
DEPRIVED MR. HILLHOUSE OF HIS CONSTITUTIONAL
RIGHT TO THE ASSISTANCE OF COUNSEL, DUE PROCESS,
EQUAL PROTECTION, AND A RELIABLE CAPITAL
PROCEEDING

(Doc. 42 at 416.) Amended claim EEE rests on new factual allegations which were not
mentioned in the original petition. For example, this claim discusses expanded facts concerning
the BEAM alcohol challenge and allegations that petitioner is an incurable sociopath. While the
BEAM alcohol challenge and accusations that petitioner was a sociopath were mentioned in the
original petition, the facts described in the original petition differ in time and type from those in
the amended petition. Accordingly, the court finds that this claim does not relate back.

Claim FFF PETITIONER'S INVESTIGATOR HAD A CONFLICT OF
INTEREST

(Doc. 42 at 433.) Petitioner's amended complaint alleges that Absolute Investigative Services
had also been appointed for Lonnie. This appointment was not mentioned in the original

petition. The original petition details a factual basis for claims that Lonnie testified inconsistently, was not believed by the prosecutors, and testified against petitioner only because of the plea agreement he was offered, but the original petition does not mention that the same investigator was used for both petitioner and Lonnie. Claim FFF does not share a common core of facts with claims in the original petition. The court finds that it does not relate back.

Claim GGG CUMULATIVE EFFECT OF TRIAL COUNSEL'S ERRORS
DEPRIVED PETITIONER OF A FAIR AND RELIABLE TRIAL
AT THE PENALTY PHASE

(Doc. 42 at 435.) The commutative error claims referenced in the original petition reference different errors than those discussed in amended claim GGG. The amended claims depend upon separate events in time and type. The court finds that amended claim GGG does not relate back.

Claim HHH THE CALIFORNIA SUPREME COURT IMPLICITLY HELD
THAT PETITIONER WAS CONVICTED AND SENTENCED
TO DEATH BY A JURY AND TRIAL COURT THAT WERE
UNREASONABLE

(Doc. 42 at 437.) Respondent concedes that this claim relates back.

Claim III THE CALIFORNIA SUPREME COURT'S HOLDING THAT
JURY SELECTION ISSUES HAD NOT BEEN PRESERVED ON
APPEAL WAS UNCONSTITUTIONAL

(Doc. 42 at 439.) The original petition stated that California Supreme Court reversed petitioner's kidnapping for robbery conviction and kidnapping-murder special circumstance, but did not set aside the death penalty. Amended Claim III is much more specific—it discusses the underlying jury issue. The general discussion of the California Supreme Court's decision in the original petition does not share a common core of operative facts with amended claim III's specific jury instruction claim. The court finds that this claim does not relate back.

Claim JJJ THE CALIFORNIA SUPREME COURT ERRED ON APPEAL
WHEN IT FAILED TO REVERSE THE DEATH PENALTY
AFTER FINDING THAT ONE SPECIAL CIRCUMSTANCE
WAS IMPROPERLY TRUE

(Doc. 42 at 441.) Respondent concedes that this claim relates back.

Claim LLL PETITIONER CANNOT BE CONSTITUTIONALLY
EXECUTED UNDER THE ATKINS V. VIRGINIA RULE

(Doc. 42 at 448.) The original petition sets forth that petitioner had temporal and frontal lobe brain damage, which impairs his ability to control his emotions, and that alcohol magnified his inability to control his emotions. (Doc. 13 at 140-141.) The operative facts of amended claim LLL are that petitioner has a mental age of between two and twelve. The original petition did not explicitly state that petitioner was mentally retarded or operating at a mental age of between two and twelve. However, the facts of brain damage and inability to control emotions are simply a different way of saying that petitioner is mentally challenged. Amended claim LLL has a common core of operative facts with the original pleading and merely states a new legal theory. The court finds that this claim relates back.

Claim MMM THE CALIFORNIA SUPREME COURT'S
PROCEDURES FOR ADDRESSING PETITIONER'S
ATKINS CLAIM ARE CONSTITUTIONALLY
INADEQUATE

(Doc. 42 at 450.) The original petition does not discuss the California Supreme Court's procedures for addressing Atkins claims. The factual basis upon which amended claim MMM relies is not mentioned anywhere in the original petition. Petitioner points out that his abeyance motion stated in a footnote that "the potentially unexhausted claims include, but are not limited to...California statutory procedures to determine 'sanity' to be executed do not comport with federal constitutional requirements." As discussed earlier, a notice pleading without a listing of supporting facts is not enough to satisfy relation back under Rule 15. The court finds that amended claim MMM does not relate back to the original petition.

Claim NNN THE CALIFORNIA SUPREME COURT DENIED
PETITIONER A FAIR CONSIDERATION OF THE
AUTOMATIC APPEAL

(Doc. 42 at 453.) The facts supporting claim NNN are that the California Supreme Court's

1 habeas review process is dominated by politics; that the California judiciary has lost its
2 independence from the other branches of government. (Doc. 42 at 454.) The amended petition
3 extensively discusses the political history of California's governors. (Id.) There are no facts in
4 the original petition which discuss the political overshadowing of the California Supreme Court.
5 The court finds that this claim does not relate back to the original petition.

6 Claim OOO THE CALIFORNIA SUPREME COURT DENIED
7 PETITIONER FAIR CONSIDERATION OF HIS PRIOR
8 HABEAS CORPUS PETITIONS

9 (Doc. 42 at 469.) The facts supporting amended claim OOO are that the California Supreme
10 Court refused to engage in a meaningful review of petitioner's state habeas application. He cites
11 numerous problems with habeas review in the California courts. Although the procedural history
12 of petitioner's habeas claim is mentioned in both the amended and original pleadings, the facts
13 concerning the failings of the Supreme Court are not. Amended claim OOO relies on facts which
14 do not appear in the original petition. The court finds that amended claim OOO does not relate
15 back to the original petition.

16 Claim PPP APPELLATE COUNSEL RENDERED INEFFECTIVE
17 ASSISTANCE OF COUNSEL

18 (Doc. 42 at 475.) Petitioner's original petition argued that cumulative error infected petitioner's
19 conviction, including, prosecutorial misconduct during the penalty phase, selection of a biased
20 jury, denial of his right to competent counsel, jury misconduct, and serious instructional error.
21 (Doc. 13 at 189.) The facts supporting amended claim PPP are that appellate counsel was
22 ineffective representing petitioner because they failed to raise numerous claims without
23 justification. The facts relied upon in the original petition are not the same as those relied on by
24 amended claim PPP; the amended claim does not rely on the same common core of facts as the
25 original petition. Petitioner points out that amended claim PPP was noted in the footnote in his
26 abeyance motion; however, under Mayle a notice pleading is not sufficient for relation back.
The court finds that amended claim PPP does not relate back.

Claim QQQ HABEAS COUNSEL RENDERED INEFFECTIVE
ASSISTANCE

(Doc. 42 at 477.) The original petition does not contain any of the facts relied upon to support amended claim QQQ. The court finds that it does not relate back.

Claim RRR THE CUMULATIVE ERROR OF COUNSEL'S ERRORS
WARRANT REVERSAL

(Doc. 42 at 480.) The original petition alleged that the cumulative effect of all the errors and violations alleged in the present petition rendered the trial unfair; however, the facts supporting this contention are very general and conclusory. The facts supporting amended claim RRR are that, over the course of the trial, defense counsel's errors created a total breakdown of the adversarial process. Petitioner discusses trial counsel's failure to introduce mitigating evidence and the failure to investigate mitigating evidence (Doc. 42 at 481). To support amended claim RRR, petitioner must rely on facts which were not mentioned in the original petition—the claims do not share a common core of facts. The court finds that this claim does not relate back.

Claim AAAA THE CALIFORNIA DEATH PENALTY SCHEME IS
UNCONSTITUTIONAL SINCE IT ALLOWS COUNTY
PROSECUTORS UNLIMITED DISCRETION IN
SEEKING THE DEATH PENALTY WITHOUT ANY
STATE WIDE UNIFORM STANDARDS

(Doc. 42 at 521.) The amended petition alleged that petitioner's death sentence rested in part on a constitutionally inadequate narrowing factor. (Doc. 13 at 186-187.) Amended claim AAAA relies on assertions and supporting facts that the death penalty is sought in an inconsistent manner throughout the California. Specifically, amended claim AAAA rests on facts concerning the wide prosecutorial discretion in seeking the death penalty. Such facts are not included in the original petition. The court finds that amended claim AAAA does not relate back to the original petition.

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Claim BBBB DEATH QUALIFICATION OF THE JURY WAS
UNCONSTITUTIONAL

(Doc. 42 at 528.) The original petition claimed that jurors were biased in favor of the death penalty (Doc. 13 at 43,46, 47-48.) Amended claim BBBB rests on allegations that numerous jurors were removed from the panel because they were opposed to the death penalty. (528). Specifically, amended claim BBBB claims that such jurors were sought out and excluded from the jury. Although the outcome is the same—a jury biased in favor of death, the core facts supporting the original and amended claims are different. The facts supporting petitioner’s contention that the empaneled jurors were biased in favor of death does not support his claim that jurors opposed to the death penalty were sought out and excluded from jury service. The court finds that this claim does not relate back.

Claim CCCC DEATH QUALIFICATION VIOLATED PROSPECTIVE
JURORS’ RIGHTS

(Doc. 13 at 570.) The original petition claimed that jurors were biased in favor of the death penalty and included facts to support this claim. (Doc. 13 at 43,46, 47-48.) Those supporting facts, however, do not support amended claim CCCC’s assertion that death qualification violated prospective juror’s rights. The original petition and amended claim CCCC do not share a common core of facts. The court finds that this claim does not relate back.

Claim EEEE CALIFORNIA’S DEATH PENALTY SCHEME IS
UNCONSTITUTIONAL

(Doc. 42 at 584.) This claim is made up of numerous sub-claims, and respondent concedes that the following sub-claims relate back:

- (1) death eligibility and special circumstances (Doc. 13 at 584.)
- (2) multiple counts of special circumstances and aggravated claims (586.)
- (3) circumstances of the crime factor claims (588.)
- (4) unadjudicated violent criminal activity claims (589.)
- (5) factor 190.3(c) prior felony claims (590.)
- (6) failure to identify aggravating and mitigating factors (593.)

- (7) failure to require unanimity as to aggravating circumstances (597.)
- (8) lack of unanimous findings by the jury claims (597.)
- (9) burden of proof and persuasion claims (599.)
- (10) proportionality of sentence and comparative sentencing claims (602.)
- (11) cumulative lack of procedural and substantive protections violates the constitution (604.)

None of the other sub-claims in amended claim EEEE relate back to the original claim, except for the cumulative constitutional error claim, which relates back only to the extent that it alleges petitioner has a right to a fair trial and equal protection under the Sixth and Fourteenth Amendments. (Doc. 13 at 188; Doc. 42 at 605.) The court finds that the other sub-claims in amended claim EEEE do not relate back.

Claim FFFF THE DEATH PENALTY AS CURRENTLY ADMINISTERED
IN CALIFORNIA IS UNCONSTITUTIONAL

(Doc. 42 at 607.) The facts supporting amended claim FFFF are that: DNA evidence has proven people innocent; the Governor of Illinois commuted death sentences; the Green River killer was not sentenced to death; and public sentiment against the death penalty is growing. These facts were not mentioned in the original petition. The court finds that there is no relation back.

Claim JJJJ PETITIONER'S CONVICTIONS AND DEATH SENTENCE
MUST BE VACATED BECAUSE OF THE CUMULATIVE
EFFECT OF ALL THE ERRORS AND CONSTITUTIONAL
VIOLATIONS SHOWN IN THIS PETITION AND THE
AUTOMATIC APPEAL

(Doc. 42 at 630.) The original petition contains a cumulative error claim. (Doc. 13 at 187-190.) However, the cumulative error claim in the original petition is much narrower than amended claim JJJJ. The original and amended cumulative error claims do not share a common core of operative facts. In other words, the facts which support the cumulative error claim in the original petition would not support the amended cumulative error claim. The court finds that amended claim JJJJ does not relate back to the original petition.

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1 C. Equitable Tolling

2 Petitioner argues that, even if his amended claims do not relate back to his
3 original petition under Mayle, the court should not dismiss the amended claims because
4 he is entitled to equitable tolling of AEDPA's one-year limitations period. Specifically,
5 petitioner avers that he is entitled to equitable tolling due to (1) the failings of his state appointed
6 counsel; (2) uncertainty in the law; and (3) reliance on this court's abeyance order.

7 The burden of demonstrating grounds for equitable tolling rests with the prisoner.
8 See Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003). In order to win equitable tolling, a
9 prisoner must demonstrate (1) extraordinary circumstances beyond the prisoners control that (2)
10 made it impossible to file a petition on time. Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir.
11 2002). Equitable tolling is "unavailable in most cases." Miles v. Prunty, 187 F.3d 1104, 1107
12 (9th Cir. 1999). Indeed, "the threshold necessary to trigger equitable tolling is very high, lest the
13 exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002). In other
14 words, to get equitable tolling due to a change in the law, petitioner must show that an external
15 force, rather than his own lack of due diligence, was the cause of the petition's untimeliness. See
16 Miles, 187 F.3d at 1107.

17 1. Failings Of State Appointed Counsel

18 Petitioner contends that his state appointed counsel's failure to raise all of his
19 meritorious claims in the state habeas process warrants equitable tolling. The Ninth Circuit has
20 concluded that, in general, counsel's negligence does not constitute extraordinary circumstances
21 sufficient to warrant equitable tolling. See Frye v. Hickman, 273 F.3d 1144, 1145 (9th Cir.
22 2001). The court finds that petitioner is not entitled to equitable tolling due to his state
23 appointed counsel's negligence, if any.

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1 2. Uncertainty in the Law

2 Petitioner argues that the change in the law between the time that he filed his
3 original federal petition and his amended petition is an extraordinary circumstance which
4 justifies equitable tolling. Specifically, petitioner argues that the change in law from interpreting
5 Federal Rule of Civil Procedure 15(c)'s relation back provision very broadly, to a much
6 narrower reading of Rule 15(c) after the Supreme Court's decision in Felix v. Mayle in 2005
7 justifies equitable tolling.

8 The California Supreme Court affirmed petitioner's first-degree murder
9 conviction and death sentence on February 25, 2002. Petitioner filed a timely petition for
10 certiorari in the United States Supreme Court, which was denied on January 13, 2003, making
11 petitioner's conviction final under AEDPA. Under AEDPA's one-year limitations period,
12 petitioner's federal habeas petition was due on January 14, 2004. This court appointed counsel
13 for petitioner in February and November 2003. Petitioner filed his first federal petition on
14 December 31, 2003 and filed a motion to hold the federal proceedings in abeyance on the same
15 day. (Docs. 12 & 13.)

16 Generally, only a change in substantive law would entitle a petitioner to equitable
17 tolling due to a change in the law. Landgraf v. USI Film Products, 511 U.S. 244 (1994) (noting
18 that procedural changes "may often be applied in suits arising before their enactment without
19 raising concerns about retroactivity"). To be entitled to equitable tolling based on a procedural
20 change, a prisoner would have to demonstrate detrimental reliance on the changed procedure.

21 Here, the court finds that petitioner cannot demonstrate reliance to his detriment on the Ninth
22 Circuit's broad interpretation of relation back in Felix v. Mayle, 379 F.3d 612 (9th Cir. 2004).

23 Petitioner filed his original petition in December 2003, prior to the Ninth Circuit's
24 August 9, 2004 decision in Mayle; therefore petitioner could not have relied on Mayle's broad
25 interpretation of relation back when he filed his original petition.
26

1 The court recognizes that habeas corpus is governed less by statutory
2 developments than by a “complex and evolving body of equitable principles formed and
3 controlled by historical usage.” McCleskey v. Zant, 499 U.S. 467, 489 (1991). However, the
4 court does not want to employ Rule 15(c) as a method of extending AEDPA’s deadline.
5 Keeping these principles in mind, the court considers whether the state of the law in December
6 2003 regarding relation back under Rule 15(c) would have allowed petitioner to reasonably rely
7 on a very broad interpretation of relation back.

8 In December 2003, when petitioner filed his original petition, a majority of the
9 circuits (five) had taken a narrow view of relation back under Rule 15(c). See United States v.
10 Hicks, 283 F.3d 380 (D.C. Cir. 2002); Davenport v. United States, 217 F.3d 1341 (11th Cir.
11 2000); Unites States v. Pittman, 209 F.3d 314, (4th Cir. 2000); United States v. Duffus, 174 F.3d
12 333 (3rd Cir. 1999); United States v. Craycroft, 167 F.3d 451 (8th Cir. 1999). One circuit had
13 read Rule 15(c) very broadly. See Ellzey v. United States, 324 F.3d 521 (7th Cir. 2003). The
14 Ninth Circuit had not yet decided this issue; however, in Anthony v. Cambra, 236 F.3d 568 (9th
15 Cir. 2000), the Ninth Circuit distinguished the majority of the circuits’ narrow interpretation of
16 relation back. In Anthony, the Ninth Circuit stated that because “each of petitioner’s newly-
17 exhausted claims in [his] amended petition was included (in unexhausted form) in his
18 original...petition.....the state clearly had been on notice of the claims” and of petitioner’s intent
19 to raise the claims. Anthony, 236 F.3d at 576-77. Thus, the Ninth Circuit concluded that
20 Anthony was distinguishable from the majority’s narrow view of Rule 15(c) because those cases
21 relied on the absence of notice to the state regarding the content of the proposed amendments as
22 ground for denying the motion. See id. at 577.

23 Additionally, at least one decision in this district had taken a narrow view of
24 relation back under Rule 15(c). By findings and recommendations filed May 14, 2002 in Felix v.
25 Mayle, the court concluded that “[t]he court cannot find that an involuntary statement claim
26 whose genesis is based on petitioner’s pre-trial interrogation by the police derives from the same

1 core of facts as the third party videotape Confrontation Clause issue. Not even the same
2 constitutional amendment is in dispute for the underlying events. Obviously, the theories and
3 facts of the claims are distinct.” (Felix v. Mayle, Civ-S-98-0828 WBS GGH P (doc. 45) 5:3-6.)
4 These findings and recommendations were adopted in full by order filed August 10, 2002.

5 Thus, when petitioner filed his original petition and abeyance motion in
6 December 2003, five circuits had adopted a narrow view of relation back, one circuit had
7 interpreted relation back very broadly, this District had adopted the narrow view of relation back
8 in at least one decision, and the Ninth Circuit had not directly addressed this issue, although it
9 had distinguished Anthony from majority view on relation back on the grounds that Anthony had
10 included the grounds for his newly-exhausted claims in his amended petition in his original
11 petition, giving the state notice of his claims.

12 Obviously, in December 2003, there was no clear statement on how to interpret
13 relation back under Rule 15(c) with regard to habeas cases and AEDPA. However, it is clear
14 that the majority view was that relation back should be construed very narrowly. Additionally,
15 in Anthony, the Ninth Circuit had indicated that relation back depended on including the newly
16 exhausted claims in the amended petition in a timely original petition— giving respondent notice
17 of “the facts and claims giving rise to the proposed amendments.” Anthony, 236 F.3d at 576.
18 Given the state of the law on relation back in December 2003, the court cannot find that it was
19 reasonable for purposes of equitable tolling, for petitioner to have relied on a broad interpretation
20 of relation back. The court concludes that petitioner has not demonstrated that the change in the
21 law was an extraordinary circumstance which prevented him from giving respondent notice of
22 the facts of his unexhausted claims.

23 The court is cognizant that, in December 2003, petitioner could not have filed a
24 mixed petition in federal court. Rhines v. Weber, 544 U.S. 269 (2005), which was decided in
25 April 2005, established that a mixed petition could be filed and held in abeyance in federal court.
26 However, in December 2003, it was possible for a petitioner to file an exhausted petition which

1 also included his unexhausted claims and their factual predicates. See e.g., Gonzales, 2006 WL
2 83054 at * 14. Similarly, unexhausted claims and their operative facts could have been listed in
3 the abeyance motion.

4 The court recognizes that petitioner did list, in a footnote, in both his original
5 petition and his abeyance motion, his potential unexhausted claims. However, petitioner did not
6 include the factual basis for his claims. Thus, Rule 15(c)'s central policy—ensuring that the non-
7 moving party has sufficient notice of the facts and claims giving rise to the proposed
8 amendments, was not satisfied.

9 The court has given careful consideration to petitioner's equitable tolling claim,
10 and is not unsympathetic to petitioner's claim; however, given the state of the case law at the
11 time petitioner filed his petition in 2003, the court cannot conclude that petitioner reasonably
12 relied on a broad interpretation of relation back under Federal Rule of Civil Procedure 15. In
13 short, the court finds that petitioner has not borne his burden of demonstrating that the Supreme
14 Court's decision in Mayle was an extraordinary circumstance which made it impossible for him
15 to timely give notice of his amended claims.

16 3. Reliance On This Court's Abeyance Order

17 _____Petitioner asserts that he is entitled to equitable tolling because he relied on this
18 court's order holding his original petition in abeyance with the understanding that he would be
19 able to return to this court following state exhaustion and present the newly exhausted claims in
20 an amended petition. However, petitioner has not demonstrated that this court actively mislead
21 him and that extraordinary circumstances beyond petitioner's control prevented him from giving
22 timely notice of his claims. See Brambles v. Duncan, 412 F.3d 1066 (9th Cir. 2005).

23 V. Conclusion

24 IT IS RECOMMENDED that:

25 (1) Respondent's motion to dismiss be granted in part and denied in part.

26 (2) The court recommends that the following claims be found to relate back to the

original petition and, therefore, be timely:

| | |
|------------|--|
| Claim A | |
| Claim B | |
| Claim Q | only to the initial search of the dwelling where petitioner and Lonnie lived and to Lonnie's statements |
| Claim Z | |
| Claim DD | only to the insufficiency of evidence instruction |
| Claim HH | |
| Claim JJ | |
| Claim MM | |
| Claim PP | |
| Claim QQ | only to the claim that the prosecutor mislead the jury when she stated that the always thought that petitioner was the murderer |
| Claim TT | |
| Claim XX | |
| Claim CCC | |
| Claim HHH | |
| Claim JJJ | |
| Claim LLL | |
| Claim EEEE | only with respect to the following sub-claims: (1) death eligibility and special circumstances (Doc. 13 at 584;)(2)multiple counts of special circumstances and aggravated claims (586;)(3) circumstances of the crime factor claims (588;)(4) unadjudicated violent criminal activity claims (589;)(5) factor 190.3(c) prior felony claims (590;)(6) failure to identify aggravating and mitigating factors (593;)(7) failure to require unanimity as to aggravating circumstances (597;)(8) lack of unanimous findings by the jury claims (597;)(9) burden of proof and persuasion claims (599;)(10) proportionality of sentence and comparative sentencing claims (602.) (11) cumulative lack of procedural and substantive protections violates the constitution (604;) and (12) cumulative error instruction only with respect to the fair trial and Sixth and Fourteenth Amendment claims. |

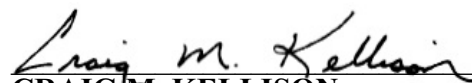
(3) The court recommends that the following claims be found not to relate back to the original claim and, therefore, be denied as untimely:

Claim E
Claim F
Claim G
Claim R
Claim S
Claim W
Claim X
Claim Y
Claim II

Claim NN
Claim OO
Claim RR
Claim WW
Claim YY
Claim BBB
Claim DDD
Claim EEE
Claim FFF
Claim GGG
Claim III
Claim MMM
Claim NNN
Claim OOO
Claim PPP
Claim QQQ
Claim RRR
Claim AAAA
Claim BBBB
Claim CCCC
Claim FFFF
Claim JJJJ

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 17, 2007.


CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE